

National Grid USA v Courter & Co., Inc.
2019 NY Slip Op 31915(U)
July 1, 2019
Supreme Court, New York County
Docket Number: 190153/2018
Judge: Gerald Lebovits
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. GERALD LEBOVITS

PART IAS MOTION 7EFM

Justice

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INDEX NO. 190153/2018

NATIONAL GRID USA, S/H/A NATIONAL GRID USA, INDIVIDUALLY AND AS SUCCESSOR TO KEYSpan CORPORATION AND THE BROOKLYN UNION GAS COMPANY; NATIONAL GRID USA SERVICE COMPANY, INC., S/H/A NATIONAL GRID USA SERVICE COMPANY, INC., INDIVIDUALLY AND AS SUCCESSOR TO NIAGARA MOHAWK, MASSACHUSETTS ELECTRIC, NARRAGANSETT AND BLACKSTONE VALLEY, KEYSpan CORPORATION, AND THE BROOKLYN UNION GAS COMPANY; NATIONAL GRID USA SERVICE COMPANY, INC., S/H/A NATIONAL GRID USA SERVICE COMPANY, INC., INDIVIDUALLY AND AS SUCCESSOR TO LONG ISLAND LIGHTING COMPANY; and NATIONAL GRID GENERATION LLC D/B/A NATIONAL GRID, S/H/A NATIONAL GRID GENERATION, INDIVIDUALLY AND AS SUCCESSOR TO LONG ISLAND LIGHTING COMPANY,

MOTION DATE 03/20/2019

MOTION SEQ. NO. 001

Plaintiffs,

DECISION AND ORDER

- v -

COURTER & COMPANY, INC.,
THOMAS O'CONNOR & COMPANY, INC.,
CURRENTLY KNOWN AS O'CONNOR CONSTRUCTORS, INC.,
And TREADWELL CORPORATION,

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 67, 68, 69, 70, 71

were read on this motion to/for

SUMMARY JUDGMENT

Cullen and Dykman LLP (John J. Burbridge of counsel), for plaintiffs.
Hawkins Parnell & Young, LLP (Michael S. Tripicco of counsel), for defendant Thomas O'Connor Company, Inc.

Gerald Lebovits, J.:

The National Grid plaintiffs (collectively, National Grid) seek contractual indemnification against O'Connor, Courter & Company, Inc. (Courter), and Treadwell Corporation (Treadwell).

National Grid moves under (1) CPLR 3212 for summary judgment against O'Connor on the grounds that prior determinations by New York State Supreme Court (Lucy Billings, J.) collaterally estop O'Connor from re-litigating certain issues in this action; (2) CPLR 1010 to sever National Grid's claims against defendants Courter and Treadwell; (3) CPLR 3103 and

3123 to strike certain of O'Connor's requests in its first notices to admit dated April 26, 2018, on the ground that those requests seek admissions concerning issues in dispute in this action; (4) CPLR 3103 for a protective order striking O'Connor's deposition notice to National Grid; and (5) CPLR 4317 (b) for a hearing or immediate trial to determine whether the indemnification provision under the contract between National Grid and O'Connor was triggered and, if so, to ascertain National Grid's damages for which it is entitled to indemnification.

Background

Michael Koulermos commenced an action against National Grid and other defendants to recover money damages for personal injury allegedly caused by lung cancer he developed due to exposure to asbestos and asbestos-containing products. Koulermos testified that he worked from 1952 to 1954 on a project at North Power Station, where he performed painting and some rigging work.

National Grid filed a cross-claim against O'Connor, alleging that O'Connor was contractually obligated to indemnify National Grid for expenses incurred in defending the action. National Grid claimed that Koulermos's testimony that he worked at North Power Station triggered an indemnification provision of the contract between National Grid and O'Connor.

Koulermos died on January 26, 2016. His claims in that action were resolved. National Grid's cross-claims were not resolved, but were instead severed into this action.

National Grid argues that in that prior action, Justice Billings already granted contractual indemnification to National Grid under the contract between O'Connor and National Grid's predecessor, the Long Island Lightning Company. National Grid also argues that the contracts on which National Grid seeks contractual indemnification in this action are the same contracts on which Justice Billings ruled in the prior action that National Grid was entitled to contractual indemnification. National Grid also claims that O'Connor had a full and fair opportunity to litigate these issues and may not re-litigate these issues in this action.

In opposing the motion, O'Connor argues that the motion for summary judgment should be denied on the grounds that (1) it violates the rule against successive summary-judgment motions; (2) it is barred by the law-of-the-case doctrine; (3) National Grid has not met its prima facie burden on summary judgment; (4) O'Connor did not have a full and fair opportunity to litigate the action from which this one was severed; and (5) triable issues of fact bar National Grid's motion for summary judgment.

National Grid's motion for summary judgment

The motion for summary judgment is denied. A court should deny a successive motion for summary judgment made "without a showing of newly discovered evidence or other sufficient justification." (*Jones v 636 Holding Corp.*, 73 AD3d 409, 409 [1st Dept 2010].) Justice Billings denied National Grid's prior motion for summary judgment against O'Connor, and National Grid's motion to reargue the denial. And National Grid does not offer any new evidence on its present summary judgment motion.

Under the law-of-the-case doctrine “ordinarily a court of coordinate jurisdiction should not disregard an earlier decision on the same question in the same case.” (*Tenzer, Greenblatt, Fallon & Kaplan v Capri Jewelry, Inc.*, 128 AD2d 467, 469 [1st Dept 1987].) Justice Billings already held in *Koulermos* that triable issues of fact exist and that National Grid was barred from re-litigating the issue of whether Koulermos’s presence at Northport was sufficient to trigger the indemnification provision of the contract between National Grid and O’Connor. (See *Koulermos v A. O. Smith Water Prods.*, 2017 NY Slip Op 32456 [U] [Sup Ct NY County Nov. 27, 2017].) National Grid’s current motion for summary judgment merely seeks to re-litigate issues previously decided against it.

Regardless, National Grid has not shown that it is entitled to summary judgment. A party moving for summary judgment “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case.” (*Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].) In deciding “a summary judgment motion, evidence should be analyzed in the light most favorable to the party opposing the motion.” (*Martin v Briggs*, 235 AD2d 192, 196 [1st Dept 1997].)

Viewing the evidence in the light most favorable to O’Connor, this court finds that National Grid has not met its burden of proof to obtain summary judgment. In this case, the court must determine whether Koulermos worked contemporaneously with O’Connor’s employees and whether O’Connor is liable to National Grid for Koulermos’ injuries. Because National Grid has not met its prima facie burden of proof, the motion for summary judgment cannot be granted.

Motion to sever National Grid’s claims against Courter and Treadwell

A motion to sever must be denied “where there are common factual and legal issues involved in two causes of action, and the interests of judicial economy and consistency of verdicts will be served by having a single trial.” (*Herskovitz v Klein*, 91 AD3d 598, 599 [2d Dept 2012].) National Grid is seeking contractual indemnification against O’Connor, Courter, and Treadwell. These claims raise common questions of fact. To define whether any contractor is liable for the injuries to Koulermos, a jury will decide whether Koulermos was present and exposed to asbestos in Northport and, if he was, when the exposure took place. Resolving National Grid’s claims against O’Connor, Courter, and Treadwell requires deciding those same factual questions. Because severance of National Grid’s claims against Courter and Treadwell can lead to inconsistent verdicts and it is economical to hear all National Grid’s claims together, the motion to sever is denied.

Motion to strike O’Connor’s request in its first notices to admit

On April 26, 2018, O’Connor served first notices to admit to National Grid concerning the time Koulermos spent at Northport. National Grid responded to the notices. Whether Koulermos worked in the vicinity of O’Connor’s employees at Northport and whether O’Connor is liable to National Grid are relevant to whether O’Connor’s work triggered the indemnification provisions of the contract between O’Connor and National Grid. The notice to admit is improper, and the motion to strike is granted.

Motion for a protective order striking O'Connor's deposition notice to National Grid

Under CPLR 3101, there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action. A subpoenaing party must "establish that the discovery sought is 'material and necessary' to the prosecution or defense of an action, *i.e.*, that it is relevant." (*Matter of Kapon v Koch*, 23 NY3d 32, 34 [2014].) The testimony of National Grid's corporate official is relevant to the cross-claim against O'Connor. National Grid claims that it has knowledge and evidence about some important and relevant issues, including Koulermos's time and place of work at Northport. Because this information is relevant to the facts that allegedly triggered National Grid's right to indemnification and National Grid's alleged damages, O'Connor has the right to depose National Grid's representative to obtain this information. Thus, the motion for a protective order striking O'Connor's deposition notice to National Grid is denied.

Motion for a hearing or immediate trial to determine whether the indemnification provision was triggered

Under CPLR 4317 (b), court may order a reference to determine a cause of action or an issue where the trial will require the examination of a long account, including actions to foreclose mechanic's liens; or to determine an issue of damages separately triable and not requiring a trial by jury; or where otherwise authorized by law. This provision shall be interpreted so that courts do not readily deprive litigants their "constitutional right to trial by jury." (*Schanback v Schanback*, 130 AD2d 332, 341 [1987].) This case does not involve an issue of damages separately triable or to foreclose a mechanic's lien. An immediate hearing to determine whether the indemnification provision was triggered will deprive O'Connor of its constitutional right to trial by jury.

ACCORDINGLY, it is

ORDERED that the motion for summary judgment is denied; and it is further


ORDERED that the motion to sever National Grid's claims against Courter and Treadwell is denied; and it is further

ORDERED that the motion to strike O'Connor's requests in its first notice to admit is granted; and it is further

ORDERED that the motion for a protective order striking O'Connor's deposition notice to National Grid is denied; and it is further

ORDERED that the motion for a hearing/immediate trial to determine if the indemnification provision was triggered is denied.

7/01/2019
DATE


GERALD LEBOVITS, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	REFERENCE	<input type="checkbox"/>	